IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL UNDER ARBITRATION ACT NO.10/1996

Board of Trustees of Port of Mormugao having their registered Office at Mormugao, Harbour – Goa. ... Appellant

V/s.

1. M/s. Pioneer Engineer Syndicate, a partnership firm registered under Indian Partnership Act, having their registered Office at 116(old No.80), Lloyds Road, Madras – 600 014.
2. Shri D. H. Rama Rao (Retd.) Chief Engineer, Panakaj Krupa No.3507, (Old 147) 13th Main Road, 4th "T" Block, Jayanagar, Bangalore – 560 041.
3. Shri J. Raja Rao, (Retd.) Chief Engineer, 1.1.76, Gandhinagar, Hyderabad – 500 380. ... Respondents

Mr. V. B. Nadkarni, Senior Advocate with Mr. Y.V. Nadkarni, Advocate for the appellant.

Mr. S. G. Dessai, Senior Advocate with Mr. S. D. Padiyar, Advocate for respondent No.1.

CORAM : SMT. RANJANA P. DESAI & N.A. BRITTO, JJ.

DATE ON WHICH THE JUDGMENT IS RESERVED : 14th JUNE 2006.

DATE ON WHICH THE JUDGMENT IS PRONOUNCED : 18th JULY, 2006.

JUDGMENT : (Per Smt. RANJANA DESAI, J.)

1. The appellant is a body corporate, constituted under the Major Port Trusts Act, 1963 having its Office at Mormugao, Goa. Respondent 1 is a partnership firm, registered under the Indian Partnership Act. Respondents 2 and 3 are the arbitrators appointed under the terms of the contract dated 12/10/1985 entered into between the appellant and respondent 1 for construction of transit shed, superstructure for multipurpose general cargo berth. In this appeal, the appellant has challenged the judgment and decree dated 26/3/1996 passed by the Civil Judge, Senior Division, Vasco-da-Gama, Goa in Special Civil Suit No.72/91 refusing to set aside the award dated 13/9/1990 passed by respondents 2 and 3.

2. The brief facts which led to the impugned order, are as follows :

In or about the year 1984, the appellants invited tenders for construction of transit shed, superstructure, the

principal items of work to be carried out being :

(a) Construction of the superstructure of the transit shed measuring 140.Om x 55.0m in plan, comprising R.C. Trusses of 55.0m span and 9.5 m rise, the bottom chord being prestressed, supported on R.C. Columns spaced 7.75 m apart and 7.5 m high along with a covered platform 5.0m, wide on one of the longitudinal sides and part of the short sides – complete with precast lateriite blocks (or equivalent approved) side walls, precast R.C. Tiles, R.C. purling covered with AC sheets, flooring and other fixtures as specified, together with associated miscellaneous works including drainage works. The R.C. Columns and the side walls shall be supported upon R.C. pile caps grade beams constructed by other.

(b) Construction of a custom office in the North East corner of the transit shed, complete with sanitary, water supply and sewage disposal arrangements.

(c) Construction of a retaining wall to support the platform.

(d) Electrical works for the transit shed and the Customs Office.

3. The contract for the work was awarded to the respondent 1 vide works order No.CR(P)/D-184(TS)/10818 dated 5/2/1985 for the amount of Rs.1,37,13,845/-. The scheduled date of commencement was 23/5/1985 and with the period of completion of 15 months, the scheduled date of completion was 22/5/1986. The terms on which the contract was awarded were reduced into writing and an agreement stipulating the terms of contract was executed on 12/10/1985 (for convenience, "the said contract").

4. Clause 19.1 of the said contract reads thus:

> "19.1. - If any dispute or difference of any kind whatsoever shall arise between the Board of the Engineer and Contractor in connection with or arising out of the contract or the carrying out of the works (whether during the progress of the works after the termination abandonment of or breach of the contract) it shall in the first place be referred to and settled by the Engineer who within a period of 90 days after being requested

by either party to do so shall give written notice of his decision to the Board and the Contractor. Save as hereinafter proved such decision in respect of every matter so referred shall be final and binding upon the Board and the Contractor until the completion of the work and shall forthwith be given effect to by the Contractor who shall proceed with the works with all due diligence whether he or the Board requires arbitration as hereinafter provided or not. If the Engineer shall give written notice of his decision to the Board and the Contractor and no claim to arbitration has been communicated to him by either the Board or the Contractor within a period of 90 days from the receipt of such notice the said decision shall remain final and binding upon the Board and the Contractor. If the Engineer shall fail to give notice of his decision as aforesaid within a period of 90 days after being requested as aforesaid or if either the Board or the Contractor be dissatisfied with any such decision then in any such case either the Board or the Contractor may within 90 days notice after receiving notice of such decision or within 90 days (as the case may be) require that the matter or matters in dispute be referred to arbitration as hereinafter provided. All disputes or differences in respect of which the decision (if

any) of the Engineer has not become final and binding as aforesaid shall be referred to two arbitrators, one to be appointed by the Board and one by the Contractor or in the case of the said arbitrators not agreeing thereto the award of an umpire to be appointed by the said arbitrators pursuant to and so with regard to the mode and consequence of the reference and in all other respect to conform to the provisions of the Government of India Arbitrator Act, 1940 (Act No.10 of 1940) or any reenactment or statutory modification thereof for the time being in force provided whoever that the umpire will be appointed in writing before entering on the reference. The said arbitrator or umpire shall have full power to open up, review and revive any decision, opinion, direction, certificate or valuation of the Engineer and neither the party shall be limited in the proceedings before such arbitration and umpire to the evidence or arguments put before the Engineer for the purpose of obtaining his said decision. No decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the arbitrators or umpire as aforesaid. The arbitrators or umpire shall not enter on the reference until after the completion

or alleged completion of the Works unless with the written consent of the Board and the Contractor provided always :

(i) That such reference may be opened before such completion or alleged completion in respect of the withholding by the Engineer or any certificate or the withholding of any portion of the retention money to which the Contractor claims in accordance with the conditions set out in Part II in the Clause 15.1.1 to 15.1.7 to be entitled or in respect of the exercise of the Engineer's power to give a certificate under Clause 16.1.1 hereof or in respect of a dispute arising under Clause 21.2 hereof.

(ii) That the giving of a Certificate of Completion under clause 9.8 hereof shall not be a condition precedent to the opening of any such reference."

5. During the course of construction of the said transit shed, certain disputes arose between the appellant and respondent 1 and the disputes were referred for adjudication to respondents 2 and 3 as arbitrators in terms of clause 19.1 of the said contract. Respondent 3 - Shri J. Raja

Rao was appointed as arbitrator by respondent 1 and respondent 2 - D.H. Rama Rao was appointed as arbitrator by the appellant.

6. After hearing the parties and after perusing the relevant record, respondents 2 and 3 made their award dated 13/9/1990. The arbitrators awarded to respondent 1 a total sum of Rs.29,96,995.85 with interest at 12% per annum from the date of the award till the date of payment or date of decree whichever is earlier. The arbitrators filed the award in the Court of the Civil Judge, Senior Division, at Vasco da Gama, Goa in terms of Section 14 of Arbitration Act, 1940 `the said Act' for short). The appellants by their arbitration petition dated 6/9/1991 challenged the validity of the said award. The said petition was filed in the Court of Civil Judge, Sr. Division at Vasco da Gama, Goa and was registered as Special Civil Suit No.72/91. Respondent 1 also filed an application praying for pendente lite interest. The learned Civil Judge, Senior Division, Vasco da Gama, by the impugned judgment and decree rejected the arbitration petition of the appellant. He also rejected the application filed by

respondent 1. The award dated 13/9/1990 was made rule of the court and the appellant was directed to pay further interest to respondent 1 at the rate of 12 % per annum on the principal sum as adjudicated by the award and confirmed by the impugned judgment and order from the date of the decree till final payment. It is this judgment and decree which is challenged before us.

7. We have heard at some length Mr. Nadkarni, learned Senior Counsel appearing for the appellant and Mr. Dessai, learned Senior Counsel appearing for the contesting respondent 1.

8. Mr. Nadkarni, the learned counsel for the appellant submitted that the impugned award deserves to be set aside because it is arbitrary, unreasonable and capricious. He submitted that the arbitrators have ignored a long line of Supreme Court judgments in respect of role, powers and jurisdiction of an arbitrator. Mr. Nadkarni contended that it is well settled that the arbitrator is not a conciliator. The arbitrator cannot ignore the law and he

cannot act irrationally or independently of the contract. If the award of the arbitrator is shown to be based upon some unsound proposition of law or the findings recorded by the arbitrator are unreasonable and irrational and are not founded on the materials on record, the award must be set aside. In this connection, he referred to the judgment of the Supreme Court in ***M/s. Sikkim Subha Associates v. State of Sikkim, AIR 2001 SC 2062***.

9. Mr. Nadkarni then relied upon the judgment of the Supreme Court in ***Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor, AIR 1999 SC 3275***, where the Supreme Court has observed that the Arbitration Act does not give any power to the arbitrator to act arbitrarily or capriciously and his existence depends upon the agreement and his function is to act within the limits of the said agreement. It is further observed that to find out whether the arbitrator has traveled beyond his jurisdiction and acted beyond the terms of the agreement between the parties, agreement is

required to be looked into.

10. Mr. Nadkarni then referred to the judgment of the Supreme Court in ***K.P. Poulose v. State of Kerala and another, AIR 1975 SC 1259***, where the Supreme Court has observed that if the arbitrator arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision, the arbitrator commits a legal misconduct, within the meaning of section 30(a) of the said Act.

11. Mr. Nadkarni also relied upon the judgment of the Supreme Court in ***New India Civil Erectors (P) Ltd. v. Oil and Natural Gas Corporation, AIR 1997 SC 980***, where the Supreme Court has observed that it is axiomatic that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it, more particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement.

12. Mr. Nadkarni contended that in this case, the arbitrators have acted in breach of the above settled principles. The arbitrators have ignored the terms of the contract particularly clauses 9.4 and 9.71 read with Part II of the said contract, which provides for liquidated damages. The arbitrators have tried to assume the role of conciliator by misinterpreting the terms of the contract and awarding amount as per their whims and notions. Mr. Nadkarni contended that the arbitrators have misinterpreted sections 73 and 74 of the Indian Contract Act and the award is based upon unsound propositions of law.

13. In this connection, Mr. Nadkarni took us to clause 9.7.1 of the said agreement. It reads thus :

Liquidated damages		9.7.1. If the Contractor shall fail to complete the Works within the time

for delay		prescribed by Clause 9.3 hereof or extended time then the Contractor shall pay to the Board the sum stated in part II as liquidated damages and not as a penalty for such default for every week or part of a week which shall elapse between the time prescribed by Clause 9.3 of extended time as the case may be and the completion of the Works. The Board may without prejudice to any other method of recovery deduct the amount of such damages from any amounts in its hand's due to which may become due to the Contractor. Provided that the total amount of such damages to be paid shall not exceed the sum stated in Part II. The payment of such damages shall not relieve the Contractor of his obligation to complete the Works or from any other of

		his obligations or liabilities under the Contract.

14. Clause 9.4 provides for extension of time. It reads thus :

Extension of Time for completion		9.4. Should the amount of extra or additional work of any kind or other special circumstances of any kind whatsoever which may occur be such as fairly to entitle the Contractor to an extension of time for the completion of the Work the Engineer shall determine the amount of such extension. Provided that the Engineer is not bound to take into account any extra or additional work or other special circumstances unless the Contractor has within 28 days after such work has been commenced or such

		circumstances have arisen or as soon thereafter as is practicable delivered to the Engineer's Representative full and detailed particulars of any claim to extension of time to which he may consider himself entitled in order that such claim may be investigated at the time.

15. Part II of the said agreement to which our attention was drawn by Mr. Nadkarni pertains to conditions of contract. The relevant part thereof reads thus :

`Liquidated Damages' 9.7.1.		¼% per week or part thereof of the total value of the contract, subject to the maximum of 5% of the total value of contract.

16. Mr. Nadkarni pointed out that the date of completion of the said contract was 22/8/1986. The appellants granted extension to respondent 1 upto 31/10/1986. The appellants did not levy any damages for the period upto 31/10/1986. The arbitrators extended time upto 31/3/1987. The appellants, therefore, made recovery for the period from 1/11/1986 to 31/3/1987 at ¼% per week or part thereof of the total value of the said agreement, subject to the maximum of 5% of the total value of the said agreement. For the period 1/4/1987 till 31/7/1987, the appellants recovered money at the rate of ½% per week subject to the maximum of 10% of the said agreement value. The total amount recovered was Rs.14,92,408.65. Mr. Nadkarni contended that this was done on the basis of the minutes of the meeting held on 13/10/1986 between the appellants and the respondents. Mr. Nadkarni took us to the minutes of this meeting. The minutes indicate that the meeting was convened in the chamber of the Deputy Chairman of Mormugao Port Trust, primarily with a view to assessing the problems and

finding out ways and means to complete the work at the earliest. The minutes, inter alia, note that having due regard to the need to have the work completed latest by 31/3/1987 and the financial constraints being experienced by the contractor, counter proposals were suggested. The clause on which heavy reliance was placed by the appellants may be quoted.

> "Without prejudice to the right of the Mormugao Port Trust to recover liquidated damages as provided in the contract, it was proposed that in the event of PES not completing the work by 31.3.1987 the rate of liquidated damages be raised from the existing ¼% to ½% per week and the ceiling from 5% to 10%. Such a higher liquidated damages was to be levied only in respect of delay, if any, beyond 31.3.1987, earlier period being governed by the existing terms".

17. Mr. Nadkarni pointed out that the minutes note that Mr. Bhushan, the Managing Director of respondent 1 agreed to the terms proposed by the appellants and

undertook to complete the work by 31/3/1987. The minutes were signed by Mr. Bhushan, the Managing Director and Mr. Raghu Prasad, Resident Engineer of respondent 1 and the Deputy Chairman, Chief Engineer, Deputy Chief Engineer and Executive Engineer of the appellants. Mr. Nadkarni contended that respondent 1 was party to these minutes and is bound by it and, therefore, amount of Rs.14,92,408.65 was rightly claimed by the appellants. Moreover, the arbitrators unreasonably held that respondent 1 was entitled to time upto 31.3.87 as it was granted by the arbitrators and the appellant was entitled to recover liquidated damages only for the period beyond 1.4.87 till date of actual completion i.e. 31.7.87 forgetting the fact that in the minutes of meeting held on 13.10.87 the representative of respondent 1 had admitted that respondent 1 is responsible for the delay even prior to 31.3.87. The arbitrators unreasonably calculated liquidated damages at Rs. 2,98,426.89 and awarded a refund of the balance amount recovered i.e. Rs.11,93,986.76 (Rs.14,92,408.65 - Rs.2,98,426.89) on

this count and while doing this, they overlooked sections 73 and 74 of the Contract Act and wrongly observed that the appellants had not proved the loss caused to them when there was no such requirement.

18. Mr. Nadkarni contended that the appellants were entitled in law in conformity with section 74 of the Contract Act to the liquidated damages as agreed between the parties in terms of the clauses quoted above at ¼% per week for the period 1/11/1986 to 31/3/1987 and at ½% per week for the period from 1/4/1987 to 31/7/1987 as the same were the estimated damages as agreed between the parties as payable by respondent 1 for the breach of the contract on their part and further no evidence was led by respondent 1 to establish that stipulated condition in clause 9.7.1 of the contract was by way of penalty or that the compensation contemplated in any way was arbitrary. Mr. Nadkarni contended that since the compensation named in the award are pre-estimated damages, the appellant does not have to prove the actual loss suffered by

it.

19. Mr. Nadkarni contended that reliance placed by the Court on ***Fateh Chand v. Balkrishan Dass***, ***AIR 1963 SC 1405*** is misplaced because in that case the Supreme Court was considering a penalty clause. He contended that even in ***Maula Bux v. Union of India AIR 1970 SC 1955***, the Supreme Court was considering a penalty clause. Mr. Nadkarni placed heavy reliance on the Judgment of the Supreme Court in ***Oil & Natural Gas Corporation v. Saw Pipes Ltd., AIR 2003 SC 2629*** to which we shall soon advert. Mr. Nadkarni pointed out that in that case, after considering the scope of Sections 74 and 75 of the Indian Contract Act, the Supreme Court observed that if the compensation named in the contract is by way of penalty, the party is entitled to reasonable compensation. But, if the compensation named in the contract for such a breach is genuine pre-estimate of loss which the parties know when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove the

actual loss suffered by him and burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Mr. Nadkarni contended that this judgment is delivered by the Supreme Court after considering its judgments in Fatech Chand and Maula Bux and hence, it holds the field now. According to Mr. Nadkarni, the trial court's judgment runs counter to the judgment in ONGC's case.

20. Mr. Dessai, on the other hand, submitted that clause 9.7.1 of the said contract providing for liquidated damages is a penalty clause within the meaning of section 74 of the Contract Act. He submitted that the sum mentioned in the said clause is not pre-estimated, genuine liquidated damages duly agreed by the parties. Mr. Dessai heavily relied on the judgment of the Supreme Court in Feteh Chand's case. He submitted that in that case, it is held by the Supreme Court that section 74 of the Contract Act lays down an uniform principle as far as stipulation naming liquidated damages and stipulation by way of penalty are concerned. He submitted that it is held by the Supreme Court that the principle of `reasonable compensation'

has to be uniformly applied. He submitted that the judgment in Fateh Chand's case is still good law. ONGC's case has made no dent in it. Mr. Dessai submitted that if the present case is examined in the light of the said judgment, the impugned award cannot be faulted. He further submitted that in the Minutes dated 13.10.86, there is no admission made by respondent 1. In any case, the arbitrators have duly considered the minutes and it is not open for this court to sit in appeal over the award. Mr. Dessai submitted that the judgment of the Supreme Court in Sikkim Subba's case is not applicable to the present case. In that case, the arbitrator had reached his conclusions by throwing overboard well settled norms. It was a case of errors apparent on the face of the award. It was a case of misconduct on the face of the award. Such are not the facts here. He submitted that the impugned award is perfectly legal and in consonance with settled principles. According to Mr. Dessai the learned judge has rightly dismissed the petition.

21. To understand the moot question involved in this case, it is necessary to first refer to Fateh Chand's case. In

that case, it was argued that the covenant which gave to the plaintiff the right to forfeit Rs.2400/- was a stipulation in the nature of penalty and the plaintiff could retain that amount only if he establishes that in consequence of the breach by the defendant he suffered loss and if it was found by the Court that that amount was reasonable compensation for that loss. The Supreme Court found that right to forfeit Rs.2400/- was manifestly a stipulation by way of penalty. The Supreme Court observed that Section 74 of the Contract Act deals with measure of damages in two classes of cases. (i) where the contract names a sum to be paid in case of breach; and (ii) where the contract contains any other stipulation by way of penalty. Since the Supreme Court was dealing with a stipulation by way of penalty, the Supreme Court clarified that measure of damages in case of breach of a stipulation by way of penalty is as per Section 74 of the Contract Act, reasonable compensation not exceeding the penalty stipulated for and the Court has jurisdiction to award compensation as is deemed reasonable in the circumstances, not exceeding the stipulated penalty. It is important to note that while coming to this

conclusion, the Supreme Court distinguished the Indian Law from the English common law where liquidated damages and stipulations in the nature of penalty are separately treated and held that the Indian Legislature has sought to cut across the web of rules and presumptions under the English common law by enacting a uniform principle applicable to all stipulations naming amount to be paid in case of breach and stipulations by way of penalty. We may quote the relevant observations of the Supreme Court. They read thus :

> " The section is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the

> English common law, by enacting an uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty."

22. Further observations of the Supreme Court are very important and they have to be read in the context of the fact that the Supreme Court has put liquidated damages and stipulations by way of penalty on par. The Supreme Court has gone on to say that assumptions made by some of the High Courts that section 74 applies only to cases where the party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited are not well founded. Following are the relevant observations of the Supreme Court :

> "It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that S.74 applies only to cases where the aggrieved party

> is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited."

The Supreme Court further observed that :

> " the section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated."

The Supreme Court clarified that the jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated, but compensation has to be reasonable and that imposes on the Court duty to award compensation according to settled principles.

23. After indicating that reasonable compensation is the

principle underlying Section 74 of the Contract Act, the Supreme Court clarified that though Section 74 says that whether or not actual damage is proved, the aggrieved party is entitled to receive compensation thereby it only dispenses with proof of actual loss or damage. This does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded only to make good loss or damage which naturally arose in the usual course of things or which the parties know when they made the contract to be likely to result from the breach. Extracts from the judgment in Fateh Chand's case have been quoted in later judgments of the Supreme Court with approval and there could be no dispute that Fateh Chand is still a good law and holds the field.

24. It is also necessary to refer to Maula Bux's case. In that case, the three judge bench of the Supreme Court was dealing with stipulation in the nature of penalty. It referred to Fateh Chand's case and affirmed the interpretation of Section 74 of the Contract Act made in that Judgment. The Supreme

Court discussed the general principles of assessment of compensation as under :

> "It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression `whether or not actual damage or loss is proved to have been caused thereby' is intended to cover different classes of contracts which come before the Courts. In case of breach of some contract it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it is to be regarded as genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be

> determined, the party claiming compensation must prove the loss suffered by him.

A reading of these two judgments lead to an inevitable conclusion that according to the Supreme Court Section 74 of the Contract Act has obliterated the distinction between the stipulations providing liquidated damages and stipulations in the nature of penalty, so far as payment of compensation is concerned. Reasonable compensation is the principle to be followed. The above observations in Maula Bux's case are applicable to both the stipulations. Therefore, even if it is accepted that we are concerned here with stipulation naming amount to be paid in case of breach and not stipulation by way of penalty, the principle of reasonable compensation will still be applicable to it. The measure and requirement of proof of damages will vary according to type of contracts. Where the loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.

25. In the present case, the arbitrators have partially awarded liquidated damages by holding that the damages or

loss, if any, could have been assessed and since damages were not proved, they cannot be granted. The arbitrators have, however, awarded liquidated damages to the extent of 50 % of the maximum permissible under clause 9.7.1 of the contract. The award, thus, is in consonance with the judgments of the Supreme Court in Fateh Chand's case and Maula Bux's case. It would not be right to say that the arbitrators have acted as conciliators or that they have awarded liquidated damages as per their whims.

26. Mr. Nadkarni, however, insisted that in ONGC's case, the Supreme Court has analysed Sections 73 and 74 of the Contract Act and has clearly stated the law that if the terms of the contract are clear, stipulating the liquidated damages in case of breach of the contract unless it is held that such estimate of damage/compensation is unreasonable or is by way of penalty, a party who has committed the breach is required to pay such compensation and in every case of the breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before

he can claim a decree and the court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract.

27. We are unable to come to a conclusion that in ONGC's case, the Supreme Court has made a departure from its earlier view. In fact the Supreme Court has referred to Fateh Chand as well as Maula Bux's cases. It has extensively and without any reservation quoted relevant extracts from the said judgments. It has only stated that in Fateh Chand's case the Court was dealing with a situation where the contract contained stipulation by way of penalty. It has reiterated what was stated by it in Maula Bux's case. The concept of reasonable compensation has not been given a go-by. The ultimate conclusions drawn by the Supreme Court in this case can, in no way, be said to be contrary to what the Supreme Court has stated in Fateh Chand's case and Maula Bux's case.

28. In fact, the conclusions drawn by the Supreme Court in ONGC's case are in consonance with Fateh Chand

and Maula Bux. The Supreme Court has concluded in paragraph 69 that terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same. The Supreme Court has further held that if the terms are clear and unambiguous stipulating the liquidated damages in case of breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, the party who has committed the breach is required to pay such compensation as per Section 73 of the Contract Act. Therefore, the concept of reasonableness of compensation is reiterated by the Supreme Court even in case of liquidated damages. It is further stated that in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the court is competent to award reasonable compensation even if no actual damage is proved to have been suffered in consequence of the breach. Therefore, the competence of the court to determine reasonable compensation is accepted. It is also clear from the conclusion that there could be cases

where a party is required to prove damages. It is further observed that in some contracts, it would be impossible for the court to assess the compensation and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by parties as the measure of reasonable compensation. Here we are not concerned with a case where it is not possible to assess the compensation. Thus, the conclusions drawn by the Supreme Court in ONGC's case also reiterate that in case of breach of contract, reasonableness of compensation is the guiding principle whether stipulation is by way of penalty or stipulation naming liquidated damages and proof of loss will be necessary in some cases.

29. No doubt, on the facts before it, the Supreme Court has observed that if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties know when they made the contract to be likely to result from the breach of it, there is no question of proving such loss and the burden is on the party to lead evidence for proving that no loss is likely to occur by such breach. But these

observations will have to be read in the context of the facts of that case. In that case, the relevant term of the contract stated that in case of breach of contract the purchaser could recover from the contractor as agreed liquidated damages and not by way of penalty, a sum equivalent to 1 % of the contract price or part thereof which the contractor had failed to deliver within the fixed period. It was further clearly stated that "this is an agreed, genuine pre-estimate of damages duly agreed by the parties". There was, therefore, an express agreement as regards pre-estimated genuine liquidated damages and, hence, it was observed that there was no need to prove them. These observations, in our opinion, do not suggest that there is deviation from the view taken by the Supreme Court in Fateh Chand and Maula Bux.

30. Mr. Dessai tried to distinguish ONGC's case by pointing out that ONGC's case is in relation to section 34 of the Arbitration and Conciliation Act, 1996, which is quite different form Section 30 of the said Act. We do not want to go into this aspect, because in our opinion, ONGC's case has not laid down

any new principle. It is in tune with Fateh Chand and Maula Bux's cases and the argument that Fateh Chand and Maula Bux's cases pertain to stipulation in the nature of penalty and, therefore, the principles laid down therein do not apply to liquidated damages, do not appeal to us. The dividing line between liquidated damages and stipulation in the nature of penalty in the matter of payment of compensation has been erased by the judgment in Fateh Chand's case. That has been accepted in Maula Bux's case and in ONGC'case the Supreme Court has affirmed the principle of reasonableness of compensation and requirement of proof of damages in some cases. Viewed in the light of the above, we do not feel that the impugned award is based on illegal proposition of law.

31. We must deal with Mr. Nadkarni's submission that minutes of meeting held on 13.10.86 ought to have been taken into consideration as in that meeting the Managing Director of respondent 1 was present and it was agreed that in respect of delay, if any, beyond 31.3.97, liquidated damages payable would be ½ per cent per week, subject to ceiling of 10 per cent

of the contract. It is apparent from the award that the arbitrators have considered the minutes of the meeting dated 13.10.86 and also the contentions advanced by both sides. On this aspect, the learned Judge has observed that respondent 1 was facing financial constraints and in the circumstances, Shri Bhushan, Managing Director of respondent 1 stated that the terms were somewhat stiff, but the Chief Engineer of the appellant explained that since the work was not completed as scheduled, stiffer terms were justified. The learned Judge has come to a conclusion that the Managing Director's consent was not free; that the terms were imposed on respondent 1 and in view of this, if the arbitrators did not take the minutes into account, it cannot be said that the arbitrators acted beyond the contract or they exceeded their jurisdiction. We concur with the learned judge on this aspect.

32. In our opinion, the learned Judge has correctly dealt with the criticism levelled by the appellant on the arbitrators' award as regards the liquidated damages in the context of clauses 9.4 and 9.7.1 read with Part II of the said contract. We, therefore, reject the submission that the learned Judge erred in

coming to the conclusion that the arbitrators have not acted beyond the contract and they have not exceeded their jurisdiction by not acting upon the minutes of the meeting or that the learned Judge has erred in coming to the conclusion that the appellants were not entitled to any liquidated damages upto to 31.3.97. In our opinion, the arbitrators have correctly assessed and awarded compensation on this count. First submission of Mr. Nadkarni must, therefore, fail.

33. So far as the submission that the appellant was not liable to pay costs of Rs.1,08,3000/- towards extra quantity of reinforcement of concrete used in the trusses; that sum of Rs.96,096/- for the work of S and G rods; Rs.35,438-94 towards the cost of apron pieces and Rs.15,792/- towards short measurement of apron pieces has been awarded without application of mind; that the arbitrators committed an error on the face of the award by granting an amount of Rs.30,247-28 towards costs of repairs to the access; that apportionment of costs of Rs.2,00,000/- between the appellant and respondent 1 is not proper; that the arbitrators committed legal misconduct in awarding Rs.11,70,000/- as additional expenditure

incurred by respondent 1 during extended period upto 31.3.1987 and that the arbitrators wrongly granted 12 % interest on the principal sum adjudged from the date of decree till final payment, we find that there is no merit in any of these submissions. It is well settled that this court cannot sit in appeal over the view of the arbitrators by re-examining or re-assessing the material. We find that on the above matters, the view taken by the arbitrators is a plausible view with which we cannot interfere. We do not find that in awarding the above sums, the arbitrators have ignored any settled principles of law or that their findings are absurd, unreasonable and irrational. It is not possible to hold that the arbitrators have ignored any material documents or that they have travelled beyond four corners of the agreement.

34. In the ultimate analysis, we are of the view that examined in the light of the judgments on which reliance is placed by the learned counsel for the appellant, the impugned award is perfectly legal. We are of the view that the judgment in M/s. Sikkim Subha Associates' case will have no application to this case. It was an extreme case where the arbitrator

had ignored all settled norms. The award was based on unsound proposition of law. The present award does not show that the arbitrators have acted arbitrarily. They have not travelled beyond their jurisdiction. We do not find that it is based on any unsound proposition of law. Vice of unreasonableness or irrationality is not attached to it. The arbitrators have considered all material documents and their award is just and fair. The challenge to the impugned judgment and the award must, therefore, fail. In the view that we have taken, the appeal will have to be dismissed and is dismissed accordingly.

SMT. RANJANA P. DESAI, J.

N.A. BRITTO, J.

ssm